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IN THE

SUPREME COURT OF THE UNITED STATES

1963

No. ~~840~~ 78

STANDARD CIGAR COMPANY, a Florida Corporation,
Petitioner,

vs.

TABACALERA SEVERIANO JORGE, S.A.,
a Cuban Corporation,
Respondent.

OBJECTION TO JURISDICTION AND REPLY TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OBJECTION TO JURISDICTION AND REPLY TO PETITION FOR WRIT OF CERTIORARI

OBJECTION TO JURISDICTION

It cannot be fairly said that the decision sought to be reviewed upon certiorari is fairly within the provisions of 28 U.S.C.A. § 1254 (1) or Supreme Court Rule 19.

It affirmatively appears from the petition filed herein that the Court should not grant the petition for certiorari as the decision sought to be reviewed is not a final judgment. The petition shows that the District Court for the Southern District of Florida dismissed the complaint "without prejudice" upon motion. That order was predicated upon the doctrine of "forum non conveniens".

The Court of Appeals reversed the District Court, holding that the doctrine was not applicable to the case at bar because the forum of convenience contended for by the petitioner, namely Cuba, was not in fact a forum which was open to the respondent. In so doing the Court of Appeals said (Petitioner's Appendix B, page 7):

> "The residual questions of law in this case, not specifically dealt with in our opinion above, are more properly determinable by the District Court upon a full hearing on the merits.
>
> The cause is reversed and remanded with directions for further proceedings not inconsistent with our opinion in the Rodriguez case."

In *Chicago & Northwestern Rys. Co.* v. *Osborne,* 146 U.S. 354, this Court held that a writ of certiorari would not lie to review a judgment of the Court of Appeals reversing a judgment of the Circuit Court and remanding the cause for further proceedings for the reason that such a judgment was not final. This Court, in so holding, cited: *McLish* v. *Roff,* 141 U.S. 661; *Rice* v. *Sanger,* 144 U.S. 197; *Meagher* v. *Manufacturing Co.,* 145 U.S. 608.

REPLY TO PETITION FOR CERTIORARI

The petition for certiorari is directed to an opinion of the Court of Appeals for the Fifth Circuit which reversed a judgment of the District Court for the Southern District of Florida, dismissing without prejudice an action brought by the respondent to recover from the petitioner a debt which was admittedly due and owing.

The complaint sought to recover a sum from the petitioner in excess of $100,000.00 as a consequence of tobacco sold by the respondent to the petitioner and delivered by the respondent to the petitioner in Tampa, Florida.

The petitioner filed a motion to dismiss predicated in the main upon two grounds: (1) That the Court should not entertain the action because of the fact that the Castro government had appointed an interventor in Cuba to take over all of the assets of the respondent corporation, and that the Cuban government was not a party to the action and service could not be obtained upon it; (2) That the Court should apply the doctrine of forum non conveniens and upon that doctrine decline to take jurisdiction.

The District Court granted the motion to dismiss "without prejudice, however, to the right of the plaintiff to institute an action on its claim against the defendant in any other appropriate court". (R. 54)

In making and entering the above order the Court gave as its reason the following (R. 54):

> "D. The plaintiff's claim did not accrue within the jurisdiction of this Court.
>
> E. The docket of this court is crowded, and to permit this suit to be prosecuted would burden this court unnecessarily with difficult and complicated litigation.
>
> F. For the convenience of parties and witnesses and in the interest of justice, the plaintiff's claim best could be litigated and disposed of in the Republic of Cuba.
>
> G. For the reasons hereinbefore stated, among others, this action should be dismissed on the ground of forum non conveniens."

The Court of Appeals reversed the foregoing decision "for further proceedings." It is as to this decision that review is sought.

CLARIFICATION OF PETITIONER'S STATEMENT OF THE CASE

The petitioner's statement of the case needs clarification.

Petitioner says (Br. 3) that its motion to dismiss, the affidavit in support thereof and its answer "showed and show (certain) facts, issues and contentions to be involved in this suit." No effort is made to segregate these facts, issues and contentions in the following several pages of petitioner's brief, yet there is a vast difference between facts, issues and contentions. To mix the wheat and chaff in this fashion makes a reply difficult to state and tedious to consider.

For example, it is said that after the sale, purchase and shipment of the tobacco in July of 1960, but before the purchase price thereof became due and payable, respondent, the revolutionary government of Cuba, intervened and took control of the entire Cuban tobacco industry. The decree of intervention is dated September 15, 1960. (R. 25) The statement that this intervention decree was entered before the purchase price became due and payable is a conclusion of the petitioner, and a rather important one at that.

In its answer to the complaint, the petitioner says (R. 45) that in accordance with the customs, agreements and understandings between the plaintiff and the defendant, the purchase price of each shipment was due and payable in Havana, Cuba, ninety (90) days to one hundred and twenty (120) days after the shipment.

This statement does not set up a legal defense to the action. It could be inferred that the purchase price could

not be demanded prior to 90 days after the shipment was due until 120 days after shipment. In other words, the petitioner could take either 90 days to pay his bill or 120 days, as he saw fit. This, obviously, is no agreement; and in fact no agreement is alleged. The language is that the right to pay at this time depended upon a custom, an agreement, or an understanding. But which?

Likewise there is no contention before the Court as to what the purpose of the intervention was, as is set forth in the petition at page 6. There was never any admission at any time that any of the facts set forth in the intervention decree were true.

In the petition (page 6, sub-paragraph 5) it is stated that among the matters of fact or contentions in issue before the District Court, was the appointment of an interventor or manage the affairs of the respondent, who has been continuously in charge and control of the respondent, and that upon his appointment, the stockholders were removed as were the officers of the respondent. This statement appears in the affidavit of the President of the petitioner. (R. 10) This may or may not have been true when the affidavit was made, which was on the 29th of November, 1960. What is not mentioned, however, is the fact that the intervention order itself (R. 24) provides that it was resolved first to arrange "the intervention of those named above by reason of this resolution, for the period of one year." This period expired on September 15, 1961, which was long before the case was decided by the Court of Appeals. Therefore, it is not correct to imply to this Court that the interventor is still in charge and control of the respondent since the intervention decree has expired by its own terms long since.

It is also said that the Cuban nationals, meaning the stockholders, officers and directors of the respondent, knew that the interventor claimed the balance due to the corporation, but nevertheless they demanded payment of the sums due to the respondent in Miami.

The fact is that the attorney for the respondent wrote a letter to the petitioner in which the following statement is made:

> "Mr. Jorge is sure that you will not recognize the unlawful acts of the so-called interventor in attempting to assert title to claims incurred prior to the so-called intervention by the revolutionary government of Cuba. He therefore anticipates no trouble or delay in the matter of collecting the balance due on this account. As he has explained to you in his previous correspondence he holds an unconditional and unqualified power of attorney authorizing him to collect the money due to company. He has sought our opinion regarding his position in connection with the collection of monies due to Tabacalero Severiano Jorge, S. A. and it is our unqualified position that the actions of the so-called interventor were taken in defiance of law and that Mr. Alvarez (the interventor) has no right to demand or collect any money due to the corporation by reason of his forceable seizure of its properties in the Republic of Cuba."

QUESTIONS PRESENTED

I.

The Doctrine of Forum Non Conveniens Is Inapplicable Unless There Are at Least Two Forms in Which the Defendant Is Amenable to Process.

II.

The Allegations, Affidavits and Exhibits Contained in the Moving Papers Were Improperly Considered by the District Judge in Applying the Act of State Doctrine and, Therefore, Such Papers and Statements Should Not Be Considered Here.

III.

The Act of State Doctrine Does Not Require Recognition or Enforcement of Confiscatory Acts of a Foreign Sovereign with Respect to Local Assets Where Such Acts Are Repugnant to Local and International Law.

IV.

Sovereign Immunity Can Not Be Invoked Except on Suggestion of the Department of State or by Proof of a Governmental As Opposed to a Commercial Activity.

ARGUMENT

I.

The Doctrine of Forum Non Conveniens Is Inapplicable Unless There Are at Least Two Forms in Which the Defendant Is Amenable to Process.

The respondent's claim was predicated upon a transitory action arising out of a debt created as a consequence of the sale and delivery of tobacco to the petitioner in Tampa, Florida. The sale and delivery of the tobacco and the amount and liability of the debt sued for were admitted in the moving papers. (R. 13) Thus, there is no question as to venue or liability.

As for the suggestion that the forum was inconvenient, there was none which was more convenient than Tampa, Florida. The debtor had its principal place of business there, the goods were shipped to the petitioner in Tampa, and the real parties in interest were Cuban refugees who elected to sue the petitioner in the latter's home district. It is difficult to see now the petitioner can assert that it could be more convenient if the suit were maintained in Cuba than in the petitioner's home city. Actually, this is a transparent and mendacious claim. With the receipt of the goods and the amount of the debt being owing there was no occasion for any kind of trial.

The petitioner's claim that the courts of Cuba furnished a more convenient forum than the District Court in Tampa, belies not only human experience, but credibility.

The touchstone of the doctrine of forum non conveniens is that there are at least two forums in which the

defendant is amenable to process, and that a choice between them exists. *Gulf Oil Corp.* v. *Gilbert*, (1947) 330 U.S. 501.

The petitioner is not amenable to Cuban process. The moving papers do not so state and since this is a necessary condition precedent, it must be assumed that it did not exist. In any case this Court can and should take judicial notice of the fact that the Cuban courts are not open to the respondent.

In addition to want of legal merit, the Court should, as a matter of public policy, foster and encourage the collection of just obligations owed to Cuban refugees. It is currently estimated that there are over 150,000 of such Cuban refugees in Miami alone, the majority of whom are obtaining Federal relief in one form or another. Reduction of the burden upon U. S. taxpayers through permitting Cuban refugees to collect their just debts from American nationals is in and of itself sufficient reason to discredit the doctrine of forum non conveniens.

The reliance upon this doctrine is simply a smoke screen designed to delay, or possibly completely avoid, payment of a debt which is justly due and owing and as to which there is no doubt.

II.

The Allegations, Affidavits and Exhibits Contained in the Moving Papers Were Improperly Considered by the District Judge in Applying the Act of State Doctrine and, Therefore, Such Papers and Statements Should Not Be Considered Here.

The defense raising the Act of State Doctrine and the principle of sovereign immunity must be made by ap-

propriate pleadings and proof and not by a speaking motion. It is well established in Florida that a motion to dismiss is used merely to test the legal sufficiency of the complaint.

The claim that the issues in the case should not be considered because they involve matters as to which the Act of State Doctrine is applicable is plainly an affirmative defense. If so, it must be asserted in accordance with F.R.C.P. 8(c). As to this it is said in Barron & Holtzoff, Vol. 1A, Chapter 7, Paragraph 279, that:

> "Rule 8(c) is a simple and effective requirement that a party responding to any claim for relief shall affirmatively allege any matter constituting an avoidance of affirmative defense. The purpose of this is to prevent surprise. A general denial will not permit proof of such matters not affirmatively alleged. * * *"

The same author says, Paragraph 349, with respect to motions to dismiss that:

> "Matters of defense not appearing on the face of the complaint need not be considered on defendant's motion to dismiss, although some courts hold that the question of applicability of the statute of frauds and other affirmative defenses may be considered where the facts establishing the defense are not controverted. This is discussed in more detail in section 279 under Rule 8, ante and the cases there cited should also be considered with this section. Certainly a motion to dismiss cannot be substituted for trial on merits, and doubtful issues cannot be resolved on such a motion."

If it be contended here that the defenses were asserted in the defendant's answer, our reply to this is that the final judgment indicates otherwise. (R. 53)

The judgment recites that the cause came on to be heard upon the motion to dismiss or to abstain from ex-

ercising jurisdiction. There was no reference to the answer in the order. Also, the order stated that the action was dismissed "on the ground of forum non conveniens." There is no suggestion that the action was dismissed because of the Act of State Doctrine.

As to the suggestion that the Court should abstain from exercising jurisdiction, this was not based upon the Act of State Doctrine, but upon the ground that the liability of the parties was governed by the laws, resolutions, proclamations and decrees of the Republic of Cuba.[1]

III.

The Act of State Doctrine Does Not Require Recognition or Enforcement of Confiscatory Acts of a Foreign Sovereign with Respect to Local Assets Where Such Acts Are Repugnant to Local and International Law.

It is difficult to see upon what basis the petitioner, a Florida corporation, can assert this doctrine. The current Cuban government is not a party to the action, and if there was any immunity existing that immunity would be personal to the Cuban government which, of course, assuming that it was a recognized government, it could assert or waive.

In *P & E Shipping Corporation* v. *Banco Para El Comercio Exterior De Cuba*, (1962, C.C.A. 1) 307 F.2d 415,

1. It might be claimed that Paragraph 14 of the motion to dismiss (R. 7) asserts the Act of State Doctrine. This paragraph suggests that the controversy as to who has the right to collect the indebtedness due the plaintiff corporation, that is the Cuban government or the stockholders, is a matter between the Cuban government and its citizens which is governed solely by Cuban law and so forth. This is not the proper way to assert the Act of State Doctrine if it be such an assertion. Also the statement is a conclusion of the pleader.

in an action brought by a representative of the Cuban government, the Court said:

> "* * * On January 3, 1961, the President of the United States severed displomatic relations between the government of the United States and the government of the Republic of Cuba, and the government of the Swiss Confederation has assumed diplomatic and consular representation of the United States in Cuba. What is the status of the Republic of Cuba as a state and its right to sue in our courts during the period of cessation of diplomatic relations? If it is not permitted to sue, then it would seem that appellee should not have been permitted to bring the suit here in question, for it appears that appellee is an agent or instrumentality of the Cuban government. If the real party in interest is not permitted to sue, then suit on its behalf, whether disclosed or undisclosed on the record, should not be countenanced. * * *"

It is obvious from the facts at bar that if the Cuban interventor sought and was permitted to intervene, it would not interpose a plea of immunity, because it would be seeking affirmative relief against the petitioner. Since it would be seeking affirmative relief, it certainly would not plead the so-called Doctrine of State. The doctrine is a defensive one personal to the foreign government involved. On the other hand, it is obvious that the Cuban government under present existing relations, could only plead the doctrine in vain. For these reasons it is submitted that the petitioner has not even a legal standing to invoke the doctrine. It is but a red herring.

The following are the principal cases relied upon by the petitioner to support its contention that the decision sought to be reviewed is in conflict with the decisions of this Court and of other circuits with respect to the Act

of State Doctrine. The inapplicability of these cases, and the lack of conflict can be readily demonstrated.[2]

Underhill v. *Hernandez*, 168 U.S. 250, involved a claim for damages predicated upon refusal to grant to a United States citizen in Venezuela a passport to leave that country; for confinement to the plaintiff's residence in Venezuela, and for certain alleged assaults. It is also significant that the United States, when the action was brought, had recognized the revolutionary government which was being sued, in the United States, for alleged personal wrongs committed in Venezuela.

In *Ricaud* v. *American Metal*, (1917) 246 U.S. 304, this Court emphasized that the government whose earlier actions were under attack, had been formally recognized by the United States as the government of that country.

In *Aetjen* v. *Central Leather Co.*, (1917) 246 U.S. 297, the hides were seized by the Mexican government to satisfy an assessment. Here there was no physical seizure, only a constructive expropriation. This Court emphasized that the Mexican government had been recognized by the United States while the action was pending. Recognition by the United States was also involved in *United States* v. *Belmont*, (1937) 301 U.S. 324.

Pons v. *Republic of Cuba*, (1961) C.A.D.C., 294 F.2d 925, involved a suit by the Cuban government against one of its nationals who admittedly held money owed to the Cuban government and who had deposited the money owed in the registry of the Court. The only question was whether or not the Cuban citizen could maintain a counterclaim.

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2. We shall not attempt to discuss all cases cited by petitioner, but only those which petitioner apparently feels are of sufficient importance to warrant some discussion.

The petitioner here could likewise make such a deposit but it simply wants to avoid payment of its legitimate debt and retain use of the money. If the money were to be put in the registry of the Court it is extremely doubtful that the Castro government, in the present atmosphere, would even attempt to claim it.[3]

If such a deposit were to be made there would then be a tangible res in the jurisdiction, and jurisdiction of the Cuban government could be obtained by publication and thereby eliminate one of the straw objections advanced by the petitioner, viz. that if it paid the respondent it could conceivably still be liable to the Cuban government.

The petitioner next contends that the Court of Appeals erroneously predicated its decision upon *Banco Nacional de Cuba* v. *Sabbatino*, (C.C.A. 2) 307 F.2d 845. A reading of the opinion sought to be reviewed readily reveals that such was not the case. The only material difference between the two cases is that in the Sabbatino case the majority of stockholders of the Cuban corporation were American citizens. To hold that the Cuban refugees, who were the officers and stockholders of the respondent

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3. This Court, in *Compania Espanola de Navigacion Maritima, S.A.*, v. *The Navemar*, (1938) 303 U.S. 68, discusses and decides when a court should refuse jurisdiction solely upon the suggestion of a claim by a foreign power. The New York Court of Appeals discussed this decision in *Lamont et al.* v. *Travelers Ins. Co.*, 281 N.Y. 362, 24 N.E.2d 81, and predicated upon it, said: "* * * No issue is raised merely by suggestion of a government which refuses to intervene and to present proof to sustain its allegations; and immunity from suit exists only where the object of the suit is to enforce a claim or right against the foreign government or its property. The mere assertion by a foreign government, without proof, that property which is the subject of controversy between parties here belongs to the government, does not constrain the court to refuse jurisdiction of that property."

corporation, are in effect without remedy to collect a debt in the United States owed them by a United States citizen simply because Castro has issued an order is to ignore the realities of life and the current international situation, not to mention national tensions, which have developed as a consequence of the "Cuban Crisis". The United States has not only given these people refuge, it is supporting them through relief agencies at the expense of the people of this country. To adhere to the principles contended for by the petitioner that respondent has no right to sue in the United States courts simply because they are Cuban refugees, is not only contrary to the provisions of the Code (28 U.S.C.A. 1332) but unrealistic.[4]

It is also to be observed that the essence of the *Sabbatino* decision is the following:

> "Since the Cuban expropriation measure is a patent violation of international law, this court will not enforce it. It follows that C.A.B. owned the sugar which was sold in the present case."

The mere fact the respondents were Cuban nationals would not render the decision sought to be reviewed in conflict with that rendered by the Court of Appeals for the Second District in the *Sabbatino* case.

In addition to the foregoing, it is universally recognized that the Act of State Doctrine does not require recognition of decrees which are extra-territorial in effect or confiscatory and unilateral.

The doctrine that under principles of comity the Courts of this country will not question or examine the validity

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4. Realistically it should be observed that the decree of intervention does not in terms give to the Cuban interventor the right to sue for and collect the debts due and owing to a Cuban corporation.

of the acts or decrees of a foreign sovereign is established without limitation that such recognition is accorded only to those acts taken within the territorial jurisdiction of the sovereign. Vladikavkazsky Ry. Co. v. *New York Trust Co.*, (N.Y. 1934) 189 N.E. 456; *A/S Merilaid & Co.* v. *Chase National Bank*, 71 N.Y.S. 2d 377; *Compania Ron Racardi, S.A.* v. *Bank of Nova Scotia*, (S.D. N.Y. 1961), 193 F. Supp. 815; *Zwack & Co.* v. *Kraus Bros. & Co.*, (1956—C. C.A. 2) 237 F.2d 255.

The refusal to recognize confiscatory decrees with respect to assets located in this country, is, of course, predicated on the fact that such decrees are contrary to our public policy.

In *Schwartz* v. *Companie Azucarera, etc.*, 208 N.Y.S. 2d 833, the Court said:

> "* * * As to the question of title to the funds, it may well be that the Cuban Government acquired title to the same through nationalization. * * * In any event, our courts have held that nationalization decrees of foreign governments are repugnant to the public policy of the State of New York (Vladikavkazsky R. Co. v. New York Trust Co., 263 N.Y. App. Div. 601, 33 N.Y.S. 2d 986; Augstein v. Banska A Hutni Akciova Spolecnost, Sup. 124 N.Y.S. 2d 446, modified on other grounds 282 App. Div. 929, 125 N.Y.S. 2d 647). While the assets of the defendant may have been 'nationalized' the courts of this state deny any validity to effect such nationalization as to the assets within the State of New York (see Bollack v. Society Generale Pour, etc., supra)."

See also, *e. g., Stephens* v. *Zivnostenska Banka, National Corp.*, 213 N.Y.S. 2d 396; *In re Liebel's Estate*, 106 N.Y.S. 2d 715. *Harris & Company Advertising, Inc.*, v. *Republic of Cuba*, 126 So.2d 687 (Fla. App. 3rd Dist. 1961).

In *48 C.J.S.* (International Law), pp. 16-18, Par. 11, the text, in part, is as follows:

> " * * * Thus the acts of a foreign sovereign in expropriating property within its own territory are not reviewable by the courts of another sovereign, even though the act or agent or the property later comes within the jurisdiction of such courts. * * *"

In *Gonzales* v. *Industrial Bank (of Cuba)*, (1961) 227 N.Y.S. 2d 456, a Cuban refugee brought an action in New York to recover on a draft drawn by a Cuban bank upon a New York bank. The Cuban Bank intervened and a Czechoslovakian ambassador appeared and asserted a plea of sovereign immunity on behalf of Cuba and the Cuban bank. The lower Court held that the Cuban law which expropriated the Cuban bank was confiscatory in nature and ineffectual to deprive the refugee of her property. The Appellate Court, in denying the appellant's motion which had the effect of affirming the lower Court, said:

> "The State Department of the United States has not filed any suggestion that sovereign immunity be considered in this action. Its failure or refusal to suggest such immunity is accorded significant weight (National City Bank of New York v. Republic of China, 348 U.S. 356, 360, 75 S. Ct. 423, 99 L. Ed. 389).
>
> The Court has decided that Law Decree 891 is confiscatory in nature, ineffectual to deprive plaintiff of her property, and is in violation of the public policies of the State of New York: * * *
>
> * * *
>
> No recognition will be given to such expropriation decrees as apply to assets located in New York (Bollack v. Societe Generale Pour Favoriser le Developpement du Commerce et du L'Industrie en France, 263 App. Div. 601, 33 N.Y.S. 2d 986; Plesch v. Banque

Nationale De La Republique D'Haiti, 273 App. Div. 224, 77 N.Y.S. 2d 43.

The United States Government does not have an overriding public policy requiring recognition of the lawless act of the Cuban regime which is clearly repugnant to our public policy. The decree is offensive and will not be given effect."

The above case is closely in point for the reason that the tobacco sold prior to the decree stands virtually in the same position as the draft issued prior to the decree, and was brought in both instances by refugees from the Castro government.

In *Terry Kane, etc.*, v. *National Institute of Agrarian Reform et al.*, No. 61-L-730, in the Circuit Court of Dade County, Florida, in an order denying the defendant's motion for summary judgment, the Court said:

"To grant defendant's Motion for Summary Judgment, recognizing the Act of State Doctrine, must of necessity, therefore, hold that a remedy exists through the courts or government of Cuba. The established courts of Cuba have been abolished and civil remedy is nonexistent according to undisputed affidavits in the file. The affidavit of Dr. Elio Rena Alvarez, a native and lifelong resident of Cuba until May, 1960, until which time he served as Judge in the highest tribunal of the Province of Havana, Cuba, being the equivalent of the Supreme Court of the United States is in part as follows:

'That there is in truth and fact no laws in open courts, no forums for judicial determination, no right of litigation or no constitutional guarantees presently existing on the island of Cuba;'

'That the Supreme Court of Cuba is now in exile and has publicly declared and unanimously endorsed that the present government of Cuba, as

such it may be called under the domination of Fidel Castro, is illegal and usurpius and without legal or legitimate authority.'

• • •

This recent Bank of Cuba case recites that the doctrine has its source in our conflict of laws principles and is thus a self imposed restraint. The learned District Court Judge D. J. Dimock then reasons that if one were to suppose a requirement of international law that a state afford full faith and credit to the acts of another state such requirement would not extend to an act of state which was in violation of international law; in other words it would violate the very legal basis for its existence. Judge Dimock's opinion then continues:

'The basis for such recognition and respect vanishes, however, when the act of a foreign state violates not what may be our provincial notions of policy but rather the standards imposed by international law. There is an end to the right of national sovereignty when the sovereign's acts impinge on international law. Judicial refusal to inquire into the validity of an act of a foreign state has also been due to a desire not to embarrass the executive in its conduct of foreign relations. See Bernstein v. Van Heyghen Freres S.A., 2 Cir., 163 F.2d 246, Cert. den. 332 U.S. 772. The United States State Department has, however, delivered a note to the Cuban Government declaring the very nationalization law which plaintiff seeks to enforce to be in violation of international law. It can scarcely be believed, therefore that judicial examination of the decree in the light of international law would embarrass the Executive.'

' • • • Courts of this country have the obligation to respect and enforce international law not only by virtue of this country's status and membership in the community of nations but also because

international law is a part of the law of the United States, see *The Pacquete Habana*, 175 U.S. 677, 700; *U. S. Cons. Art. 1*, ±8, cl. 10; *1 Oppenheim, International Law*, 41-2 (8th ed., *Lauterpacht*, 1955), supra.'"

IV.

Sovereign Immunity Can Not Be Invoked Except on Suggestion of the Department of State or by Proof of a Governmental As Opposed to a Commercial Activity.

There are only two ways in which sovereign immunity can be asserted. The first is by formal suggestion of the Department of State by the Attorney General, or in the absence of that, by proof that the acts of the sovereign involved were governmental as opposed to commercial in nature.

In *Banco Nacional De Cuba* v. *Steckel*, 134 So2d 23, 24 (3rd D.C.A. Fla. 1961), the Court held:

"The defendant's plea of sovereign immunity was not properly made. The procedure for raising a question of sovereign immunity is by making it a subject of diplomatic representation to the United States Department of State and the claim, if recognized, may be set forth and supported in an appropriate suggestion to the court by the Attorney General of the United States or an officer acting under his direction. See Harris & Company Advertising, Inc. v. Republic of Cuba, Fla. App. 1961, 127 So.2d 687; National City Bank of New York v. Republic of China, 348 U.S. 356, 75 S. Ct. 423, 99 L. Ed. 389; The Navemar, 303 U.S. 68, 58 S. Ct. 432, 82 L. Ed. 667; The Pesaro, 255 U.S. 216, 41 S. Ct. 308, 65 L. Ed. 592; Ex parte Muir, 254 U.S. 522, 41 S. Ct. 185, 65 L. Ed. 383; and United States v. Lee, 106 U.S. 196, 1 S. Ct. 240, 27 L. Ed. 171. The question of immunity was brought before the trial court by simple motion to dismiss filed on be-

half of the defendant, who made both a special and a general appearance. This was improper and the court's failure to recognize such a plea did not constitute reversible error."

See also: *State* v. *Dekle*, 137 So.2d 581, (Fla. App. 3d Dist. 1962); *Stephen* v. *Zivnostenska Banka, National Corp.*, 199 N.Y.S. 2d 707 (Supr. Ct. 1960).

In *Harris & Company Advertising, Inc.*, v. *Republic of Cuba*, 127 So.2d 687 (Fla. App. 3d Dist. 1961), the Court noted that the Department of State had made it clear that it would not intervene in cases where it felt the transactions of the sovereign were commercial as opposed to governmental, and that accordingly, it was incumbent upon the sovereign to prove its right to immunity notwithstanding the refusal of the Department of State to interpose a formal suggestion. In short, if the Department of State fails to intercede, the sovereign must *prove* that its challenged acts were governmental (*jure imperii*) as opposed to commercial (*jure gestionis*) in nature since only in the former case will it be entitled to claim immunity. Specifically, the Court held (127 So.2d at 692-693):

> "In this country, the Department of State, in the well-known Tate letter, made clear its position that it will not intervene in favor of sovereign immunity in cases where non-governmental functions are involved. This letter was approved in National City Bank of New York v. Republic of China, supra, which makes any claim for sovereign immunity in our courts *dependent on showing by evidence* that the case involves matters *jure imperii* and not *jure gestionis*.
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> In the present case, deposits in various banks have been attached, which, *until it is shown by preponderance of the evidence* that they are directly related to activities *jure imperii*, cannot be deemed immune from

the powers of the courts within the territories of which they are kept by the decision of the foreign government itself * * *." (Emphasis supplied).

The foregoing Florida decisions establish the substantive law and the public policy of the State of Florida with respect to the expropriation decrees of the Castro government. These decisions are in keeping with decisions of this Court, as well as the Courts of Appeal of the other Federal circuits.

CONCLUSION

The Court of Appeals has completely answered every question raised by the petition and brief. Its decision is legally sound and morally correct. The petition should be denied.

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I HEREBY CERTIFY that a true copy of the foregoing Objection to Jurisdiction and Reply to Petition for Writ of Certiorari was mailed to FOWLER, WHITE, GILLEN, HUMKEY & TRENAM, ESQS., Attorneys for Petitioner, 1002 Citizens Building, Tampa, Florida, this day of March, 1963.

THOMAS H. ANDERSON